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No. 94-859

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR
A GREAT OREGON, et al.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR CARGILL, INCORPORATED, AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICUS

Cargill, Incorporated (besides its holdings in other states) is the successor of Leslie Salt Co. and, as such, is the largest private landowner in the San Francisco Bay area, owning some 25,000 acres and holding a perpetual lease over an additional 15,000 acres. On much of the acreage, the company is engaged in salt-making by a process of evaporation and precipitation. Included are significant areas of present or former salt marsh, where two endangered species, the salt marsh harvest mouse and the California clapper rail, have been found. All of the land, whether or not still actively used

for salt-making, is protected by historic levees which have come to be used by two other protected species, the California least tern and the western snowy plover. The necessary periodic repair of the levees and the salt operations involve some disturbance of the habitat of these protected species and, accordingly, implicate the Fish and Wildlife Service's "harm" regulation invalidated by the Court of Appeals in the present case. Nor would it be surprising if other (or newly listed) protected species were discovered on Cargill's lands in due course.

What is more, Cargill is not free to wait and see — at its peril — whether the Fish and Wildlife Service, or an environmental group, will in fact assert a violation of Section 9 of the Endangered Species Act, as construed in the challenged regulation. The reason is that the U.S. Army Corps of Engineers asserts regulatory jurisdiction over large portions of Cargill's acreage around San Francisco Bay. See, e.g., *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978); *Leslie Salt v. United States,* 896 F.2d 354 (1990), *cert. denied,* 498 U.S. 1126 (1991); *Leslie Salt Co. v. U.S.,*789 F.Supp. 630 (N.D. Cal. 1991). In consequence, the company has been subjected to permit conditions proposed by the Fish and Wildlife Service under the "incidental take" provisions of Section 7 of ESA. See *Cargill v. West,* No. C-92-20756-RMW (PVT) (N.D. Cal. July 12, 1994), slip op. 3.

In the circumstances, it is plain Cargill has a real interest in the outcome of this case. We believe the company's special position will bring to bear a fresh perspective that will be helpful to the Court's resolution of the issue. As will be evident, the present Brief does not merely repeat arguments already before the Court. New points are put forward.

ARGUMENT

Introduction and Summary

No one pretends that the Congress of 1973 clearly indicated — whether in the text of the statute, in its legislative history, or otherwise — an affirmative intention to encompass habitat degradation, with or without "actual killing or injuring" of a protected species, as a type of "harm" within the "take" prohibition in Section 9 of the Endangered Species Act. The debate among the judges and the lawyers accordingly centers on two other questions: (1) Whether, applying the principles of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Act is sufficiently ambiguous on this matter as to permit the Fish and Wildlife Service to resolve it, and, if so, whether its regulation to that end is a "reasonable" implementation of the statute; and (2) whether legislative action and inaction in 1982 when Congress revisited the ESA effectively "ratified" the Service's "harm" regulation. As to the *Chevron* analysis, we submit Judge Sentelle (in what was originally a dissent, Pet. App. 68a-72a) and Judge Williams (in his second opinion, Pet. App. 2a-10a) have the best of the argument; and, likewise, we think Judge Williams's final opinion on "implied legislative ratification" (Pet. App. 10a-24a) is dispositive. It would be inappropriate for an *amicus* to recapitulate the points there made. But it may be that we can contribute a somewhat different perspective that bears on both questions.

A. In this Court, the Solicitor General has glossed over the history of the "harm" regulation and has been less than clear about its practical scope. For good reason. A closer look reveals a quite radical chopping and changing by the Fish and Wildlife Service as to the proper reach of Section 9 in respect of habitat modification. We also discover the Service's express recognition that Congress had not meant to authorize a regulation under Section 9 that would encom-

pass habitat degradation except as another means of "killing or injuring" endangered species. And, on the other hand, it emerges that, while claiming a very restrictive scope for its "harm" regulation, the Service in fact issued one that, for all its qualifiers, is almost wholly open-ended.

This history is relevant to the issues presented. First, the degree of deference due an administrative agency's regulation is, to some extent at least, diminished by repeated shifts of position, culminating in a rule that is not remotely contemporaneous with the statute it purports to implement. Moreover, a court must find it difficult to defer to an agency that says one thing and means another. It is arguable, indeed, that deference is due to the agency's articulation of *limitations* on its statutory discretion, rather than to the promulgated regulation itself, which, perhaps, should be treated as *unintentionally* broad. And, for much the same reasons, the claim of legislative ratification in 1982 is severely weakened by doubt as to whether Congress understood the true scope of the 1981 regulation in light of the misleadingly conservative description accompanying its publication.

B. So, also, the practical consequences of the "harm" regulation have not been highlighted in the Government's brief. To be sure, in seeking certiorari, it was said that the question presented was "of exceptional public importance," and that the regulation "is a critical tool in an effort to preserve listed species." Pet. 12,25. But, certiorari once granted, we hear far less about the important service performed by the regulation, now painted as adding little, if anything, to the bare statutory phrase "harm." Yet, of course, the true bite of the regulation bears on the question whether Congress can be supposed to have authorized, or later ratified, it. We accordingly discuss that aspect in a moment.

C. Having sketched the history of the "harm" regulation and examined its practical application, we briefly discuss the ultimate question, whether Congress intended to authorize this result. We note the limited provisions for habitat protection (in Sections 5 and 7 of the Act) and find these inconsistent with reading a *general* prohibition on habitat degradation into Section 9. Nor is it plausible that, having itself defined what constitutes a "taking" and having expressly rejected a proposal to include habitat modification within the definition, Congress meant to authorize the Fish and Wildlife Service radically to expand the "taking" prohibition.

Turning, finally, to the 1982 amendments to the Act, we submit that, far from justifying a broad reading of Section 9, they compel a rejection of the "harm" regulation as overstepping the congressional mandate. Indeed, the habitat protection measures now authorized to be required of federal permittees by the "incidental take" provisions added to Sections 7 and 10 would be superfluous if habitat degradation was (and is) already criminalized as a "taking" under Section 9.

With this preface, we now turn to the history of the current "harm" regulation, 50 C.F.R. § 17.3.

A. The History and Scope of the "Harm" Regulation

1. In July 1975, for the first time, the Fish and Wildlife Service proposed regulations to define certain of the terms by which the statute itself defines a "taking" of protected species under Section 9. 40 Fed.Reg. 28,712, et seq. (July 8, 1975). No definition of "harm" was then put forward, but "harass" was defined as follows (40 Fed.Reg. at 28,714):

> "Harass" in the definition of "take" in the Act means an act which either actually or potentially harms wildlife by killing or injuring it, or by annoying it to

> such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harass,"

To say the least, this was a most unexpected stretching. A word, "harass," that connotes knowing and purposeful victimizing was forced to embrace the "effects" of "significant environmental modification" which, however unintentionally, "potentially" "disrupt[ed]" "essential behavior patterns." It is not surprising that two and a half-months later, the Service had second thoughts. 40 Fed.Reg. 44,412 et seq. (Sept. 26, 1975); see J.A. 49-51.

In September 1975, it was decided that "harass," dealing with "potential for injury," should be confined to "acts or omissions which are done intentionally or negligently," and that "the concept of environmental damage being considered a 'taking' [would be] retained, but [would] now be found in a new definition of the word 'harm.' " 40 Fed.Reg. at 44,413; J.A. 50. The latter term, it was noted, "covers actions or omissions which actually, (as opposed to potentially), cause injury." *Ibid.* The Preface to the new regulations summed up: "By moving the concept of environmental degradation to the definition of 'harm,' potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish and wildlife." *Ibid.* The new regulation — which remained in effect until mid-1981 — read as follows (40 Fed.Reg. at 44,416; J.A. 51):

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or

> degradation which has such effects is included within the meaning of "harm";

This was presumably a narrowing of the original proposal (defining "harass"). But, even so, the Service in due course concluded it had strayed some considerable distance from the intent of Congress.

2. In April, 1981, Interior's Associate Solicitor submitted a written Opinion to the effect that at least one reading of the outstanding regulation went "beyond the intent of Congress," and that the Ninth Circuit had erred in *Palila v. Hawaii Dept. of Land & Natural Resources,* 639 F.2d 495 (9th Cir. 1981). 46 Fed.Reg. 29,490-29,492 (June 2, 1981). See also J.A. 66. Thereupon, in June, the Fish and Wildlife Service proposed to rewrite the "harm" regulation by substituting a simple sentence that made no reference to habitat: " 'Harm' in the definition of 'take' in the Act means an act or omission which injures or kills wildlife." 46 Fed.Reg. at 24,490.

Two aspects of this proposal should be stressed. The first is that, to fall under the prohibition, the "killing" or "injuring" of protected wildlife must be as *direct and immediate* where it results from habitat modification as in all other cases of "takings." This follows from the wording of the proposed new regulation which, as just noted, does not separate out habitat modification (indeed, does not mention it), but subsumes it as a *means* of "killing" or "injuring." The second significant point is that, just as with respect to other acts prohibited by Section 9, the "killing" or "injuring" must be of one or more *individual* members of the protected species. Indeed, the Associate Solicitor's Opinion underlying the proposal repeatedly, and pointedly, refers to the victims as "individual wildlife" or "individual fish." 46 Fed.Reg. at 29,491, 29,492. The upshot is that, under this June 1981 proposal, eventual harm, or even death, for the species as a whole, no matter how dramatic and inevitable,

was not within Section 9, unless a particular, immediate, victim could be identified.

If the regulation had remained as initially proposed, this litigation would not have come about. No one has, or would, contest the proposition that a protected animal — most obviously those confined to a limited area, such as freshwater fish and most insects — may be killed or harmed by destroying its habitat. But, although the greatest threat to an endangered species *population as a whole* is habitat destruction, the occasions when an individual member is immediately killed or injured as a result of an intrusion on its habitat must be relatively rare. One cannot posit many instances involving the filling in or draining of a landlocked pond where endangered fish live, the flooding of the burrow of a protected rodent while the rodent or its offspring are within, or the destruction of the only food source or shelter of a particular listed animal. At all events, any issue involving such a truly narrow regulation would present no "question of exceptional public importance in the administration of ESA and the protection of endangered and threatened species" requiring resolution by this Court. Pet. 12.

3. Alas, the "harm" regulation did not emerge from the notice and comment process unscathed. The proposed retrenchment provoked a hue and cry, the overwhelming number of commentors objecting to the revision as accomplishing an undue narrowing. 46 Fed.Reg. 54,748, 54,749-54,750 (Nov. 4, 1981); J.A. 66, 68-72. While the Fish and Wildlife Service purported to be holding the line, it in fact gave way substantially.

The final regulation, still in effect, was rewritten and published on November 4, 1981 to read as follows (50 C.F.R. § 17.3):

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act

> may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

The full sway of the added second sentence is not self-evident on the face of the regulation. Nor did the Service, in announcing it, disclose the radical effect of the change. Indeed, most of the Preface published in the Federal Register is disarming.

Thus, it was asserted that "[t]his additional language makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to Section 9." 46 Fed.Reg. at 54,750; J.A. 72. Qualifiers abound: "*actually* kills or injures"; "*significant* habitat modification or degradation"; "*significantly* impairing *essential* behavioral patterns . . ." *Ibid.* The Preface continually incants the view that "[Congress] did not . . . express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species" (46 Fed.Reg. at 54,749; J.A. 67), or, more pointedly, "[the contention] that habitat modification alone is a taking . . . is without support in the Act or legislative history." 46 Fed.Reg. at 54,750; J.A. 71. See also, 46 Fed.Reg. at 54,749, 54,750; J.A. 68-69, 69, 72. The Associate Solicitor's Opinion of a few months earlier is endorsed. 46 Fed.Reg. at 54,749; J.A. 70-71. And there is even the apparently flat declaration that "section 9's threshold does focus on individual members of a protected species." 46 Fed.Reg. at 54,749; J.A. 68.

Even the attentive reader — including a Member of Congress — easily might be lulled by all these caveats into supposing the final 1981 regulation was a mere statement of the obvious: that a protected animal can be killed or injured by destruction of his habitat, as well as by other means. Yet, the rule, it turns out, *is* effectively a habitat protection provision, with *no* qualification except that the habitat must

be — as the term naturally implies — actually occupied by the species for breeding or feeding or sheltering. In sum, a wolf in sheep's clothing.

The critical fact is that, after all, no *individual victim* is any longer required. So much was made explicit, albeit in a convoluted way, in the following passage (46 Fed.Reg. at 54,748; J.A. 67):

> Some of the comments in favor of the redefinition, however, viewed the action as limiting "harm" to direct physical injury to an individual member of the wildlife species. This was not the intent of the Service and the final redefinition addresses that perception. The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.

Effectively, this cancels all the emphasis on "actual" killing or injuring. Once the test is "injury to a population" (46 Fed.Reg. at 54,749; J.A. 70), it is a foregone conclusion that "significant habitat modification or degradation" that "significantly impair[s] essential behavioral patterns" will constitute the requisite "injuring." Indeed, since a "population" will be injured by failure of its members to breed, or, in some circumstances, to grow in numbers, no "injury" to any living member — beyond discouraging its breeding — is necessary. Thus, notwithstanding all the Service's disclaimers, we are back to including as a "taking" degradation of any protected species' habitat without more — assuming only that "habitat" here means an area *presently* occupied by an endangered species for feeding or breeding or sheltering.

4. Unsurprisingly, this is how most courts have understood the regulation, apparently with the approval of the Fish and Wildlife Service.

There are, it is true, a handful of cases rejecting a "taking" claim on the ground that the habitat modification is trivial or irrelevant to the life of the endangered species. See Pet. Br. 46. But the prevailing judicial reading of the Service's "harm" regulation is that it embraces habitat degradation that adversely impacts on the *future* of the population of an endangered species, without any need to show the *present* killing or injuring of any individual member.

Perhaps most instructive is the landmark *Palila* litigation, invoked here as guiding Congress in 1982 and as representing a correct resolution of the question. See Pet. 20, 21-22 and nn.20 and 21; Pet. Br. 27, 37, 45. In the first round (*Palila I*), the district court concluded that the State of Hawaii's maintenance of feral goats and sheep within the habitat of an endangered bird constituted a "taking" under Section 9 of the ESA because the game animals, by consuming their seedlings and sprouts, prevented the regeneration of trees essential to the survival of the birds. *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F.Supp. 985, 988-991, 995 (D. Haw. 1979). This was a somewhat indirect chain of causation, the basis for which was, in any event, tenuous. See 471 F.Supp. at 988 n.2. There was, in fact, no proof of "actual" killing or injuring of any individual bird. See 471 F.Supp. at 989 n.7. On appeal, moreover, the judgment was affirmed on what was deemed the sufficient basis that "the Palila was *endangered* by the [State's] activity." 639 F.2d 495, 497 (9th Cir. 1981) (emphasis added). To say the least, that formulation is very open-ended.

Five years later, a similar suit was aimed at the State's maintenance of mouflon sheep in the same area, claimed to

be a like threat to the Palila because of its consumption of the same seedlings and sprouts. *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070 (D. Haw. 1986) ("*Palila II*"). In this instance, the district court expressly addressed the current "harm" regulation and concluded (649 F.Supp. at 1075):

> A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.

Applying this standard, the court went on to find that the presence of the mouflon sheep constituted a "taking" because that presence "threatens the *continued existence* and the *recovery* of the Palila species." 649 F.Supp. at 1080, 1982 (emphasis added).

On appeal, it is fair to say, the United States disowned the "threat to recovery" ground of the decision, but it endorsed the result on the first basis. 852 F.2d 1106, 1107, 1108 n.4 (9th Cir. 1988); Pet. 21-22 n.20. The Solicitor General does not tell us whether the Service adheres to that fine line today. At all events, however, it should be stressed that while affirming on the "survival" ground alone (852 F.2d at 1107, 1110), the appellate court concluded that a "taking" had occurred on a mere finding that the continued presence of the mouflon sheep "*could* result in extinction" of the endangered species. 852 F.2d at 1107, 1110 (emphasis added).

The *Palila* cases do not stand alone. Thus, in *Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D. Tex. 1988), aff'd *sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), a "taking" in violation of Section 9 was found on the basis of

tree harvesting operations that primarily interfered with the *breeding* of an endangered species of woodpecker. See 694 F.Supp. at 1271-1272. And the court expressly endorsed the broad interpretation of the "harm" regulation articulated by the district court in *Palila II*, quoted a moment ago (*supra*, p. 12). 694 F. Supp. at 1270. In affirming, the court of appeals likewise looked to adverse effects on the woodpecker *population*, not the killing or injuring of any particular bird. 926 F.2d at 438-439.

The same view has been stated, albeit in dicta, in the Eighth Circuit and re-affirmed in the Ninth. *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300-1301 (8th Cir. 1989); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1419-1420 (9th Cir. 1990); *National Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512-1513 (9th Cir. 1994).

The pattern continues to the present day. While invalidating it as unauthorized, the court below read the Service's "harm" regulation in the same way. Pet. App. 6a, 25a-26a, 68a, 69a, 70a-71a. And only last month, a federal district court in California pointedly declined to follow the District of Columbia Circuit in the present case and adhered to the Ninth Circuit decision in *Palila II*. *Marbled Murrelet v. Pacific Lumber Co.*, No. C-93-1400-LCB, slip op. 2 n.2 (N.D. Cal. Feb. 27, 1995). Again, the primary basis for concluding that a "taking" had occurred was that logging operations interfered with the breeding habits of the endangered bird — not a showing that any living bird had been killed or injured by the company's activities. Slip op. 55-57, 59.

5. It will be noticed that none of the cases just cited was initiated by the United States. But they are endorsed by the Solicitor General on behalf of the Secretary of the Interior and there is no reason to doubt that the Fish and Wildlife Service approves their reasoning. On the contrary, a careful

parsing of the "harm" regulation, although at first blush restrictive, admits of the broad reading the courts have given it. Having left the wording unchanged since 1981 with full knowledge of the judicial implementation, the Service must be deemed to have endorsed it. And, of course — as the Government itself emphasizes (Pet. 23-24) — the practical impact of the regulation far exceeds the few prosecutions actually initiated.

Our submission is that this "huge definition" (to borrow Judge Sentelle's phrase, Pet. App. 69a) cannot be fitted within the narrow confines of Section 9 of the Endangered Species Act. Nor do we believe the Service properly can invoke the questionable doctrine of "implied legislative ratification" after misleadingly announcing its seemingly innocuous new regulation as having a very restricted scope consistent with the Associate Solicitor's opinion.

B. The Practical Consequences of the Regulation

1. It requires no elaborate analysis to appreciate that the Fish and Wildlife Service's "harm" regulation exposes all those who engage in any kind of commercial activity on land or water to the constant risk of civil or criminal penalties, or injunction at the suit of concerned citizens or federal officers. See § 11, 16 U.S.C. § 1540. Given the number of listed species — including mammals, reptiles, amphibians, birds, fish, crustaceans, and insects (see 50 C.F.R. § 17.11) — there are very few areas where it is safe to assume no protected animal may be present, if only momentarily. And if disturbance of habitat counts as a "taking," provided only the future of the protected population is thereby adversely affected, any substantial land operation is likely to run afoul Section 9 of the Act.

2. This reality drives many to seek a so-called "incidental take" permit under Section 10. 16 U.S.C. § 1539. But such permits are not free. The Fish and Wildlife Service will

require the submission of a "conservation plan," to which the Service may add "such other measures" and "such terms and conditions," including "reporting requirements," as it deems appropriate. § 10(a)(2)(A) and (B), 16 U.S.C. § 1539(a)(2)(A) and (B); 50 C.F.R. § 17.22, 402.14(g), (i) and (j). In practice, the burdens imposed on an applicant today are often extremely onerous, typically including the setting aside of substantial "conservation" areas and a radical curtailment of activities. See Pet. 23-24 and n.22. Sometimes, indeed, the conditions of the permit are so pervasive as to render the operation uneconomic.

3. In light of the onerous "mitigation" measures typically exacted as the condition of an "incidental take" permit, the costs and delays of the process, and the continuing reporting obligations afterwards, some operators might well conclude that they would forgo applying for a permit, exercise caution and take their chances. But many operators will have no such choice.

Any activity conducted under license or permit from a federal agency, such as the Army Corps of Engineers or the EPA, is subject to be conditioned in the same way, even though it has been determined that the activity will *not* jeopardize the continued existence of any endangered species or adversely affect its critical habitat. § 7(b)(4), 16 U.S.C. § 1536(b)(4). Thus, willy-nilly, federally licensed operators may have an "incidental take" permit, with all its burdensome obligations, thrust upon them. Although we question its legitimacy, the practice (at least in some areas) is that such involuntary "permits" are regularly imposed.

This only arises, however, if the "incidental taking" of an endangered species is anticipated. *National Wildlife Federation v. National Park Serv.*, 669 F.Supp. 384, 389-390 (D. Wyo. 1987). Once again, then, the bite of this unusually harsh provision turns on the scope of the "taking" prohibi-

tion in Section 9. Under the Service's current "harm" regulation, it will come into play very often — presumably whenever a protected species is thought to be within the activity perimeters. See 50 C.F.R § 402.12(d)(2). This is far more often, one may surmise, than Congress ever contemplated.

C. The Limited Intent of Congress

At this point, some may be tempted to exclaim: "So what! The Fish and Wildlife Service ought not be condemned for its initial twists and turns or its lack of total candor, but, on the contrary, congratulated for ultimately writing a broad regulation and following an 'incidental take' practice that reaches the *real* problem, habitat destruction, and thus advancing Congress' general goal to preserve and restore endangered species of wildlife." This, however, ignores that the Endangered Species Act is not a mere declaration of objectives, leaving all questions of implementation to an appointed agency. To be sure, some matters *are* left to the administrators, such as the listing of endangered and threatened species, albeit, even then, specific statutory criteria are laid down. § 4, 16 U.S.C. § 1533. But the Act itself contains a very detailed prescription as to how the general goal is to be achieved and specifies *how far* public and private activities potentially disturbing endangered wildlife will be required to yield in the interest of conservation. In sum, Congress, responsive to conflicting pressures, made hard choices which unelected bureaucrats are not free to override.

1. On the particular score of habitat destruction, the Congress of 1973 very clearly did not enjoin all activities on private land that contains protected wildlife, and likewise eschewed any scheme under which a federal agency would enjoy such unrestricted injunctive power. Instead, the Endangered Species Act dealt with that matter by providing for

land acquisition to create conservation areas. § 5, 16 U.S.C. § 1534.

A second tool designed to deal with habitat destruction was provided by Congress in 1978 with the addition of provisions authorizing the designation of "critical habitat." §§ 4(a)(3), 4(b)(2), 16 U.S.C. §§ 1533(a)(3), 1533(b)(2). The designation process was refined by the 1982 amendments.

The very restricted scope of these provisions must be stressed. First, not every area used by a protected species may be included; only "critical" habitat is eligible for designation. § 3(5), 16 U.S.C. § 1532(5). Second, before making any such designation, the Service must "tak[e] into consideration the economic impact, and any other impact, of specifying any particular areas as critical habitat," and determine whether "the benefits of . . . exclusion outweigh the benefits" of inclusion. § 4(b)(2), 16 U.S.C. § 1533(b)(2). Third, any critical habitat designation must be published and may be challenged at a public hearing. § 4(b)(5), 16 U.S.C. § 1533(b)(5). And, most important, designation of critical habitat only affects federal agencies and their permittees § 7(a)(2), 16 U.S.C. § 1536(a)(2), not the general public.

Needless to say, this carefully balanced program is thrown overboard under the Service's "harm" regulation which, as we have seen, effectively withdraws *all* occupied habitat from disruptive activities by *any* private operator. This is not mere theory: in actual practice, the Service has largely ignored the Congressional mandate to designate "critical habitat" contemporaneously with the listing of a protected species, avoiding the difficult process of weighing competing concerns and relying, instead, on its pervasive "harm" regulation. It is not conceivable that Congress meant to allow its measured solution to be overruled in this way.

2. Nor is this all. When dealing with operators *other* than the federal agencies or their permittees, the Endangered Species Act is equally clear as to the acts prohibited. So far as relevant here, Section 9 — the only provision which addresses wholly private actors — proscribes the "tak[ing]" of protected fish or wildlife. § 9(a)(1)(b), 16 U.S.C. § 1538(a)(1)(b). If that term had been left undefined, it would be impossible to stretch it to embrace habitat degradation, whatever the consequences. But, it is equally implausible that Congress meant to delegate broad defining power to the Service when it took the trouble itself to define "take." § 3(19), 16 U.S.C. § 1532(19). Nor is it credible that the Service was left free to select one of those statutory terms, "harm," and expand it to absorb all the others; and to do so in a way that is wholly at odds with the "active" voice of all the defining verbs listed by Congress as varieties of "taking."

In sum, as the legislative history indicates, Section 9 — and, specifically, the prohibition on "taking" protected wildlife — is aimed at "those who would capture or kill [protected species] for pleasure or profit." 119 Cong.Rec. 30162 (Sept. 18, 1973). Congress itself having deleted habitat modification from the definition of "take" (see Pet. App. 9a-10a), the Service of course could not re-introduce such a provision. As we have seen, recognizing the obstacle, the Service has sought to accomplish the same end through a deceptive regulation. But unauthorized rewriting of a statute is no more permissible when done surreptitiously than when done openly.

3. With respect to the alleged "implied legislative ratification" of the "harm" regulation in 1982, we have already commented that, given the pretty dress in which the Fish and Wildlife Service wrapped its blunt instrument, Congress may not have understood what it was seeing. Pp. 8-9, *supra*.

For the rest, we cannot improve on Judge Williams's treatment. See Pet. App. 10a-24a.

One further point should be made in response to the Government's reliance on the 1982 amendment which added the "incidental take" provisions in Section 7 (16 U.S.C. § 1536(b)(4)) and Section 10 (16 U.S.C. § 1539(a)(1)(B) and (2)). It is not clear how far Congress meant to authorize the Service to propose habitat protection measures as part of the agency "consultation" process under Section 7 or to impose them as a condition of an "incidental take" permit under Section 10. See p. 15, *supra*. But, the Government's submission notwithstanding (Pet. Br. 35-36, 38-40), there is certainly no basis for reading these amendments as expanding the "taking" prohibition in Section 9, or as confirming an expansive reading of that prohibition, to reach any habitat modification that adversely affects a protected population. Indeed, the insertion of these provisions cuts in the opposite direction.

In return for immunity in respect of any "incidental" taking, the new provisions presumably authorize the imposition of habitat protection measures that Section 9 did not already mandate. Merely exacting an undertaking not to commit a crime under existing law would make little sense; the idea was to empower those administering the statute to impose *additional* conditions, directed to minimizing the *risk* that the incidental taking of a protected species would occur or, more generally, to mitigating any adverse impact on the population as a whole. This could have been achieved by rewriting Section 9 itself to embrace habitat modification that adversely affected the endangered population, or that entailed a risk of harm to an individual animal. But Section 9 was *not* amended. Instead, the more pervasive prohibition was authorized *only as to federal permitees* — whether those obtaining an "incidental take" permit from the Fish and Wildlife Service or those operating under a

permit issued by another federal agency (such as the Corps of Engineers). Thus, unless they are to be treated as superfluous, the 1982 amendments indicate that a "taking" — whether or not "incidental" — was not deemed to include indirect "injury" to a population through habitat degradation.

We conclude that the "harm" regulation so grossly oversteps the boundaries set by Congress in the Endangered Species Act that it cannot be saved by invoking the principle of judicial deference to administrative construction, nor by resort to the elusive doctrine of implied legislative ratification.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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